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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN,

Appellants,

v.

STATE OF MISSISSIPPI,

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 77-836

UNITED STATES OF AMERICA,

Petitioner.

v.

SMITH JOHN and HARRY SMITH JOHN,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS AS *AMICUS CURIAE*

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CONSENT OF ALL PARTIES

All of the parties to the two captioned cases have consented in writing to the filing of this brief *amicus curiae* by the Mississippi Band of Choctaw Indians. The letters of consent are filed herewith pursuant to Rule 42(2) of the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

As we show within, the Mississippi Band of Choctaw Indians (the Tribe) is a federally recognized Indian Tribe of more than 3,700 members with a Reservation established by Acts of Congress and declaration of the Secretary of the Interior under authority of the Indian Reorganization Act of 1934, (Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461-479).

The decisions of the Supreme Court of Mississippi and of the United States court of appeals hold the Indian Reorganization Act inapplicable to the Mississippi Band of Choctaw Indians, and their reservation invalid (J.S. App 4a, 8a; Pet. App 4a, 19a-20a, 22a). Both Courts also hold that the State of Mississippi has exclusive criminal jursidiction within the land held in trust by the United States for the Mississippi Band of Choctaw Indians and that such trust land is not "Indian Country" within the meaning of 18 U.S.C. 1151 and 1153. (J.S. App. 8a; Pet. App 22a).

The decisions below if allowed to stand will terminate the tribal court system and jeopardize the Tribe's trust relationship with the United States. As this would be destructive to the welfare of the Tribe and its people, the Tribe has a vital interest in these cases.

STATEMENT

1. The Mississippi Choctaw before 1918

The Choctaw Indian Tribe was indigenous to the area now occupied by the State of Mississippi, though its original territory exceeded the State's boundaries.[1] After

[1] See Treaty at Hopewell, January 3, 1786, 7 Stat. 21.

having its territory narrowed through a series of treaties[2] the Choctaw Tribe in 1830 was forced to cede all tribal land in Mississippi.[3] The bulk of the Choctaw Tribe was to move to Oklahoma, individual Choctaw Indians were, however, permitted to remain in Mississippi and were promised a reservation of one section of land each (note 3, supra Article 14).

The promise was not fulfilled. Extensive land frauds by government agents resulted in most of the Choctaws who remained in Mississippi never receiving the land promised them by treaty. As the Court of Claims stated in *Choctaw Nation v. United States,* 81 Ct. Cls. 1, 15:

> [Article 14] is seemingly free from ambiguity. The rights conferred are positive ones, defined with a degree of precision apparently incapable of misapprehension, and notwithstanding this fact the large number of Indians who remained in the State were subjected to a series of maladministration of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.[4]

[2] E.G., 1801—Treaty at Fort Adams (7 Stat. 66); 1802—Treaty at Fort Confederation (7 Stat. 73); 1803—Treaty at Hoe-Buckintoo-pa (7 Stat. 80); 1805—Treaty at Mount Dexter (7 Stat. 98);

[3] Treaty at Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333.

[4] The treaty was not fulfilled for the Choctaw who went to Oklahoma either. The principal consideration for their leaving

[footnote continued]

Until the early 1900's the United States largely ignored the Mississippi Choctaws or was concerned only with moving them to Oklahoma. The Mississippi Choctaws, in this period, lived as outcasts in Mississippi, part of neither white nor black society, but, perhaps as a result, retained their language, traditions, and cohesion. They lived primarily in seven aboriginal Indian villages in the area of Philadelphia, Mississippi.[5]

The State of Mississippi gave no services to the Choctaws who remained in the State, and indeed denied the full-blood Choctaws "all social and political privileges" *Winton v. Amos*, 255 U.S. 373, 379 (1921). Eventually the Mississippi congressional delegation spearheaded the move to recognize federal responsibility for the plight of the Mississippi Choctaws, and to have federal Indian programs extended to them.

The Mississippi Choctaws' situation in the early part of this century was described by Representative Venable of Mississippi in supporting a federal Indian appropriation

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their homeland was that "no part of the land granted them [in the west] shall ever be embraced in any territory or State" (Article IV).

As the Indians had suspected, pressures for white entry and then statehood resulted in the formation of the State of Oklahoma despite the treaty promise. See Cohen, *Handbook of federal Indian Law* (GPO 1942) pp. 427-430.

[5]The villages, which remain the centers of the Reservation today, are Bogue Chitto, Bogue Homa, Conehatta, Pearl River, Red Water, Standing Pine, and Tucker. The best history of the Mississippi Choctaws between 1830 and roughly 1970 is John Holbrook Peterson, Jr., *The Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations*, a doctoral dissertation submitted to the University of Georgia (Athens, Georgia, 1970) and published in facsimile by University Microfilms, Ann Arbor, Michigan (1970), hereafter referred to as "Peterson." We are lodging a copy with the Clerk.

for them. (Hearings before subcommittee of House Committee on Appropriations; Indian Appropriation bill, 1922, 66th Cong. 3d Sess (1920), p. 329):

> . . . . When I came to Congress . . . I was already interested . . . in the condition of the full blood Choctaw Indians of Mississippi, about 1200 of whom live in my district . . . . Their economic condition was very bad. They had no schools, they lived back in the interior along the little creeks and rivers.
>
> * * * * *
>
> They reserved certain land to themselves when the Choctaw Tribe moved to Oklahoma. But they were relieved of all restrictions. They were a people who had never had any experience in the handling of individualistic property . . . The result . . . was what anyone would have expected, that knowing nothing of the value of the land, and having had no experience in the handling of land, in the course of time they practically lost their lands and parted with them for a song . . . .
>
> * * * * *
>
> The result is that the Indians, without any fault on their own part and we will say without any fault on the part of the Government—as such—we will say they were unfortunate in their agents—never received any substantial relief at all.
>
> * * * * *
>
> I did not feel that it was an answer to say that these Indians at one time had certain lands, because the way the Government let them handle these lands produced the result that was inevitable.

The Bureau of Indian Affairs had sent special agents to visit the Mississippi Choctaws in 1908 and again in 1916.

"The reports of these agents emphasized the poor health, education, and economic status of the Choctaws" (Peterson, *op. cit.* 110). With pressure from the Mississippi Congressional delegation (see Peterson, 1093; statement of Representative Venable, supra) an Agency of the Bureau of Indian Affairs was established at Philadelphia, Mississippi in 1918 to serve the Mississippi Choctaws (Act of May 25, 1918, 40 Stat 573; Peterson, 111-118).

2. The Agency

Under a series of specific appropriations beginning with the establishment of the Agency, the United States began purchasing in trust for Mississippi Choctaws land in and around their traditional villages.[6]

While the purchases were being made, the Choctaws were beginning to receive the advantages extended to other Indian tribes by the United States. Thus in the 1920's and early 1930's the United States opened a series of Indian elementary schools providing the first formal education available to most Mississippi Choctaw Indians:

Pearl River School—1920
Standing Pine School—1920
Tucker School—1921
Bogue Homa School—1922
Red Water School—1925
Conehatta School—1928
Bogue Chitto School—1930
(Peterson, p. 129)

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[6]Act of May 25, 1918, 40 Stat. 573; Act of June 30, 1919, 41 Stat. 15; Act of February 14, 1920, 41 Stat. 420; Act of March 3, 1921, 41 Stat. 1236; Act of May 24, 1922, 42 Stat. 570; Act of January 24, 1923, 42 Stat. 1191; Act of March 3, 1925, 43 Stat. 1149; Act of May 10, 1926, 44 Stat. 461; Act of January 12, 1927, 44 Stat. 941; Act of March 7, 1928, 45 Stat. 206; Act of March 4, 1929, 45 Stat. 1568-69; Act of May 14, 1930, 46 Stat. 286; Act of February 14, 1931, 46 Stat. 1121.

A Bureau of Indian Affairs hospital was opened in 1929 and expanded in 1934. (Information supplied by The Choctaw Agency, Bureau of Indian Affairs).

3. The Indian Reorganization Act

The true return to dignity and self-government began for the Mississippi Choctaw Indians as it did for many other tribes in the 1930's.

In 1934 Congress enacted the Indian Reorganization Act, supra, 25 U.S.C. 461-479. Section 5, 25 U.S.C. 465, authorized the Secretary of the Interior, without additional authorization from Congress, to acquire lands ". . . within or without existing reservations . . . for the purpose of providing lands for Indians." Section 7, 25 U.S.C. 467, authorized the Secretary of the Interior to "proclaim new Indian reservations on lands acquired persuant to . . . this Act." Section 19, 25 U.S.C. 479, defined Indians so as to include not only recognized bands as well as tribes but "all other persons of one-half or more Indian blood."

Under these provisions the United States made additional purchases for the Mississippi Choctaws. H. Rpt. No. 194, 76th Cong., 1st Sess. (1939) p. 1. The Interior Department then proposed and Congress enacted the Act of June 21, 1939, 53 Stat. 851, (J.S. App. 1a-2a), which declared that "title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi . . . is hereby declared to be in the United States for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The specific purposes of the 1939 Act were to place the lands already purchased for the Choctaw Indians in Mississippi "in the same status as the lands being purchased under the Indian Reorganization

Act" and to "facilitate matters greatly if the Indians should choose to organize under Section 16 of the Indian Reorganization Act and take over administration of their lands" H. Rept. No. 194, *supra*, pp. 2-3.

On December 4, 1944, acting pursuant to the 1939 Choctaw Act and Section 7 of the Indian Reorganization Act, 25 U.S.C. 467, the Secretary of the Interior issued a proclamation listing the lands held in trust by the United States for the Mississippi Choctaws and stating that "such lands are hereby declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians of one-half or more Indian blood." 9 Fed. Reg. 14907 (1944); Pet. App. 23a-25a. On April 20, 1945, the Secretary ratified the Constitution and Bylaws of the Mississippi Band of Choctaw Indians, limiting membership to Mississippi Choctaw Indians of one-half or more Indian blood (Art. III).

4. The Tribe Since Reorganization

The Mississippi Choctaw Indian population living on or near the Reservation based on a 1974 survey is 3,783 Indians.[7] Unlike many Indian tribes, the majority of the Choctaws are full-blood Indians, and Indians of less than half-blood are, as shown above, not eligible for membership. The 1974 survey shows (*id* p. 16, table 20) that 80.3% of the Choctaws predominantly speak the Choctaw language in their homes; an additional 12.3%

[7] Choctaw Demographic Survey, pp. 2, 4. The Survey, made under grant from the Office of Education, United States Department of Health, Education and Welfare, was published in March, 1975 by the Mississippi Band of Choctaw Indians. We have lodged a copy with the Clerk and served copies on the parties.

speak both Choctaw and English. Only 7.1% reported that they speak predominantly English at home (*ibid*).

The Mississippi Band of Choctaw Indians has made steady progress in a difficult environment under federal trust responsibility, and has developed a strong government and system of social services.

The elementary school system has been improved, with modern facilities in each community and a BIA Choctaw Central High School has been added; the schools offer bi-lingual Choctaw-English programs.

Vast strides have been made in housing, largely Indian built through a tribal construction company and federal funding. The Indian Health Service has recently completed a new hospital on the Reservation and a tribal community health program strives to make medical service available to all the people.

The Tribal government is well situated in a modern complex of buildings, and is well organized and capable.

The total federal expenditure on behalf of the Tribe in fiscal year 1976 was $10,762,400, covering a full range of social services.[8]

5. Law and Order

An important part of the progress of the Mississippi Band of Choctaw Indian has been the establishment of a federal-tribal court system. The Mississippi Choctaw Reservation is located in a portion of Mississippi where white racial intolerance and police insensitivity are well documented recent historical facts, and too often present today. It is important to the progress of the Tribe, a group of culturally, racially and linguistically distinct

[8] The expenditures are detailed in App. B of the Tribe's *amicus* brief supporting review in No. 77-575.

people, that they have federal law enforcement to assure that crimes against them are punished, and thus discouraged. It is equally important to the Tribe that Indians accused of offenses in their communities are apprehended by Indian police and are tried either in the tribal court (misdemeanors)[9] or in federal courts, thus minimizing the effect of local prejudice in apprehension, jailing, and trial.

From December 1944, when the Reservation was established, to 1968, law enforcement, to the extent that it existed, was left to the sheriffs or the counties where the Reservation is located. The results were far from satisfactory. It was difficult to get State law enforcement within the Reservation, and difficult to keep such enforcement from being abusive.

In 1968, on a petition for a writ of *habeas corpus* fully briefing the jurisdictional status of the Reservation for the first time, the judge of the county court for Neshoba County ruled that a crime committed by an Indian on the Reservation was "within the exclusive jurisdiction of the United States federal courts." No appeal was taken by the State, and since that date, until the decisions below, the United States has exercised exclusive criminal jurisdiction over crimes by or against Indians within the Reservation.[10]

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[9]While the Court is commonly referred to as the "Tribal Court" it is a Bureau of Indian Affairs "court of Indian Offenses" See 25 C.F.R. 11.1 *et seq*. Its three principal judges are tribal members. A local lawyer, usually non-Indian, serves as auxilliary judge. See p. 11, *infra*.

[10]See letter dated December 17, 1968, from E.J. Fisher, Acting Superintendant of the Choctaw Agency to the Commissioner, Bureau of Indian Affairs, App. A *infra*.

Law Enforcement is maintained through a Court of Indian Offenses and a police force drawn entirely from the Tribe but paid and directed by the BIA. A well equipped tribal jail was completed in 1974 with Federal Law Enforcement Assistance funds. Prior to that time the government contracted for use of jails as far away as Meridian, Mississippi, to avoid use of local county jails, several of which were considered unsafe for Indian defendants.

After 1968 special treatment was instituted for Indian juvenile offenders through the tribal Youth Center and tribal foster homes.[11]

The nine year performance of the tribal court and police force has won the endorsement not only of the Tribe and its members but of local non-Indian communities as well.

This case occurred in Leake County, Mississippi. As a result of the decisions below, the tribal court was closed and the tribal police force jeopardized. In a letter dated February 1, 1978, to the Superintendent of the Choctaw Indian Agency,[12] the Leake County prosecuting attorney stated:

> I feel that I am qualified to evaluate the effectiveness of the Tribal Court, as I have been Prosecuting Attorney for the past 10 years. There have been a number of occasions during this time wherein we have had to call upon Law and Order to assist us in

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[11]Information concerning the tribal court system Youth Center and jails was furnished counsel by Robert Benn, Superintendent of the Choctaw Agency, Bureau of Indian Affairs, Philadelphia, Mississippi, by letter dated November 22, 1977 and in telephone conversations.

[12]A certified copy is attached as Appendix B *infra*.

serving papers or making arrests on the reservation. To the best of my information, that cooperation has been 100 percent.

Our criminal docket is usually heavy, and the machinery of the Tribal Courts has certainly served to take a burden off Leake County. I have had a chance to observe the justice and punishment meted out by the Tribal Criminal authorities, and here again I believe this has been effective.

I also serve as Youth Court Prosecutor in my capacity as County Attorney. When I first took office, we were dealing with Indians through the Leake County Youth Court. However, it later developed that the Tribal Court took jurisdiction. I feel the latter move has been more effective because you actually have dormitories and physical facilities on the reservation to deal with Indians exclusively and they are probably more responsive to rehabilitation efforts from their own people.

In summary, please consider this my letter of support and best wishes in your efforts in trying to restore the Tribal Court system which existed in 1977. I pledge my support and help in any way needed.[15]

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[15] See also the letter dated February 6, 1978 from the President of the Leake County Board of Supervisors App. C *infra*, and the letter dated February 20, 1978, from the President of the Citizens Bank of Philadelphia, Mississippi, App. D, *infra*.

ARGUMENT

I.

THE TRIBE'S RESERVATION IS VALIDLY ESTABLISHED UNDER THE INDIAN REORGANIZATION ACT.

A. The series of legislation and executive action leading to the establishment of the Mississippi Choctaw Reservation in 1944 is regular and lawful.

In 1918, Congress appropriated money to establish an Indian Agency for the Choctaw Indians in Mississippi. Each year thereafter through 1931, Congress purchased land for the Choctaw Indians which the United States held in trust for them. When the Indian Reorganization Act was enacted, the Secretary of Interior continued purchasing land for the Choctaws under Section 5 of that Act (25 U.S.C. 465) which authorizes the Secretary of the Interior to acquire lands "within or without existing reservations . . . for the purpose of providing lands for Indians." Section 7 of the Act (25 U.S.C. 467) authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act . . . ."

In order that there would be no confusion as to the lands purchased before the IRA, Congress enacted the Act of June 21, 1939, which specifically declared that land purchased for the Choctaw Indians of Mississippi is held in trust by the United States for such persons "of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The purposes of that Act were clearly stated in the committee reports. The Act was to place the land already purchased for the Choctaw Indians in Mississippi "in the same status as the lands being purchased under the Indian Reorganization Act" and to "facilitate matters greatly if

the Indians should choose to organize under Section 16 of the Indian Reorganization Act and take over administration of their lands," H. Rept. No. 194, 76th Cong. 1st sess., pp. 2-3.

Thus in 1944 when the Secretary of the Interior formally proclaimed the land a new Indian reservation, he did so with full and careful authorization by Congress.

B. The Indian Reorganization Act is fully applicable to the Mississippi Band of Choctaw Indians.

1. Congress' power to legislate on Indian Affairs extends to the Mississippi Choctaw.

Contrary to the underlying assumptions of the courts below (J.S. 6a-8a; Pet. App. 13a-14a) Congress' guardianship over Indians is not limited to the protection of intact tribes but reaches the protection of individual Indians and bands or communities of Indians fragmented from tribes, *United States v. Holliday*, 70 U.S. 407, 417-421 (1852). Article I, Section 8, Clause 3 of the Constitution expressly gives Congress power over commerce with the Indian tribes. But Congress' power flows not only from that clause. As war and government policy broke up tribal structures, a broader constitutional base for Congress' power over Indian affairs was recognized by this Court. In *Board of Commissioners v. Seber*, 318 U.S. 705 (1943), this Court, in upholding the immunity from state taxation of land purchased for individual Indians, under two Acts of Congress held (at 715):

> The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized.

* * * * *

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands . . . leaving them . . . needing protection. Of necessity, the United States assumed the duty of furnishing that protection, *and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic* [emphasis supplied].

Seber is particularly relevant here because it upholds the constitutionality of Congress' provision of land, and tax immunity, to "un-enrolled Creeks of the half blood or more ***" although the tribal rolls of that Tribe, also removed to Oklahoma, had been closed (318 US at 718-719).

Similarly, in *United States v. McGowan*, 302 U.S. 535 (1938), discussed more fully within, this Court upheld the "Indian country" status of land purchased by Congress for scattered Indians in Nevada, well after Nevada's statehood and after the other Indians of the state had gone to Reservations previously established.

Plainly, Congress had authority to provide trust lands, a reservation, and other federal protections, for the numerous and then destitute Mississippi Choctaws. It would be both senseless and cruel if Congress, having removed the bulk of a tribe to a reservation, was without power later to establish similar federal protection for the remnant left behind—the group often in most need of help.

The Treaty of Dancing Rabbit Creek, much relied upon by the Courts below, is not to the contrary. In the first place the Treaty has long been superseded by other treaties and legislation, including statehood for Oklahoma. See Cohen, *Handbook of Federal Indian Law*,

(GPO 1942) pp. 427-430. Moreover, this Court has consistently recognized, often over the strenuous dissent of Indian tribes, that Congress in its continuing trust responsibility for Indians may alter the provisions of a treaty. E.G., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-588 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 555-566 (1902).

2. The Indian Reorganization Act in fact applies to the Mississippi Choctaws.

The Indian Reorganization Act is not limited to tribes already organized and living on reservations. Section 5 authorizes the Secretary to acquire lands "within or without existing reservations" and further provides that the lands may be acquired "for the purpose of providing lands for Indians," not just for tribes. Neither existing reservations nor existing tribal structures are required. Section 7, indeed, authorizes the Secretary "to proclaim *new* Indian reservations on [such lands]" (emphasis added).[14]

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[14]That Eastern bands of removed tribes such as the Seminole, Cherokee, and Choctaw and other fragmented tribes were not excluded from the act is also shown by the specific exclusion of tribes "located in the State of Oklahoma" and "the Klamath Reservation in Oregon" from certain of the provisions of the act. The remnant bands, which were not located in Oklahoma, and by then were clearly separate from the Oklahoma tribes whose rolls had been closed, were not excluded. See Act of May 31, 1900, 31 Stat. 236, which required Mississippi Choctaws to settle in Oklahoma prior to the approval of the final rolls to be members of the "Choctaw Nation." See also *Choctaw Nation v. U.S.*, 81 Ct. Cls. 1, 19; and see *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2517, 520-521 (C.A. 5, 1966) recognizing the immunity from suit of the Seminole Tribe in Florida organized under the Indian Reorganization Act.

But if there could be any doubt that the act applies to a group such as the Mississippi Choctaws, it is removed by the definition of the scope of the act in Section 19. That Section carefully and specifically defines the Indians to whom it applies in three categories (Section 19):

1. "All persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction . . ."
2. "All persons who are descendants of such members who were on June 1, 1934 residing within the present boundaries of any Indian reservation . . ."
3. "All other persons of one-half or more Indian blood . . . ."

The limitation of the act for Indians not covered by clauses one and two above is in terms of degree of Indian blood, not prior recognition of the band nor prior existence of a reservation. Indeed the House of Representatives had proposed 1/4 Indian blood as sufficient for non-enrolled, non-reservation Indians to receive the benefits of the Act, but the Senate required one-half, and the Senate version prevailed.[15] Thus this is no casual provision, but a deliberate choice by Congress to allow the establishment of reservations for previously unorganized groups of Indians and to bring such Indians under federal trust responsibility if they satisfy the one-half Indian blood requirement.[16]

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[15] H. Rept. No. 1804, 43d Cong. 2d Sess. (1934) p. 3; H. Rept. No. 2049 (Conference Report), 73d Cong. 2d Session (1934) pp. 5-6, 8.

[16]Representative Howard, one of the sponsors of the bill, explained Section 21 of the House bill (Section 19 of the Act) as follows: (Cong. Rec. June 15, 1934, p. 12056)

> For the purposes of this act, section 21 defines the persons who shall be classed as Indians. In essence, it recognizes the

[footnote continued]

C. The decision by the Secretary of Interior to proclaim the Reservation should be given great weight.

Congress, as we have shown, enacted the Act of June 21, 1939, for the express purpose of allowing the Mississippi Band of Choctaw Indians to organize under the IRA if it so chose. The Secretary in 1944 proclaimed the land a reservation and in 1945 approved the Constitution of the Tribe. Decisions of this sort, which are of a largely political nature, have traditionally been afforded great weight by this Court.

For at least 100 years, this Court has without exception deferred to decisions by the Secretary of Interior and Congress as to whether an entity is an Indian tribe. In *United States v. Holliday, supra,* 70 U.S. 407, 419 (1866), the Court held that:

> "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."

---

status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood [one-half in the Senate bill]. The latter provision is intended to prevent persons of less than one-fourth Indian blood who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood.

The Senate drew the line at one-half. See also the 1935 legal opinion attached to the Solicitor General's petition for certiorari, Pet. App. 46a-48a.

See also *The Kansas Indians*, 72 U.S. 737, 755-756 (1867) (federal recognition of continued existence of tribe prevented State taxation of tribal land).

An unbroken line of cases—*United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *United States v. Sandoval*, 231 U.S. 28 (1913); and *United States v. Candelaria*, 271 U.S. 432 (1926)—confirms that the courts will not review recognition of an Indian tribe by the executive or legislative branches unless that decision is "arbitrary" or a "manifestly unauthorized exercise of power." *United States v. Sandoval*, supra at 46; *Baker v. Carr*, 369 U.S. 186, 216 (1962). See also the discussion of *McGowan, infra* p. 15.

The legislation authorizing the Secretary's action here, the characteristics of the Tribe, the existence of an active federal agency and congressional support since 1918, all preclude any suggestion of arbitrariness in the Secretary's recognition of the Mississippi Band of Choctaw Indians and his declaration establishing their reservation.

II.

THE TRIBE'S RESERVATION IS INDIAN COUNTRY UNDER 18 U.S.C. 1151 AND CONSEQUENTLY IS UNDER THE EXCLUSIVE CRIMINAL JURISDICTION OF THE UNITED STATES AND THE TRIBE AS TO CRIMES INVOLVING INDIANS.

Federal criminal jurisdiction depends on whether the land in question is "Indian country" as defined in 18 U.S.C. 1151. That section (enacted as law with the rest of Title 18 by the Act of June 29, 1948, 62 Stat. 683) defines three types of land as Indian country:

1. "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ."

2. "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state . . ."

3. "all Indian allotments, the titles to which have not been extinguished . . . ."

The revision note, published with the Section, shows that it is "based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan,* 302 U.S. 535 . . . . Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*, 232 U.S. 442."

A. The Tribe's reservation, as a reservation established under federal law, is Indian country.

As we have shown, the Reservation was validly established as a reservation under the Indian Reorganization Act and the Act of June 21, 1939. All land within the Reservation (here there is only trust land) is thus Indian country under the first clause of 18 U.S.C. 1151, as lands within the limits of any Indian reservation under the jurisdiction of the United States.[17]

---

[17] The language "under the jurisdiction of the United States" might appear redundant or to beg the question. Its purpose becomes clear if it is borne in mind that there are numerous State Indian reservations in which land is not held in trust by the U.S. and as to which the United States asserts no criminal jurisdiction. Some of these are: the Passamaquoddy and Penobscot Reservations in Maine and the Alabama-Coushatta Reservation in Texas. See Map, Indian Land Areas, U.S. Department of the Interior, Bureau of Indian Affairs, 1971.

B. The Tribes' land is equally Indian country as a dependent Indian community.

Congress' inclusion of dependent Indian communities within its definition of "Indian country" is an incorporation of this Court's decision in *United States v. McGowan*, 302 U.S. 535 (1938). That case, we submit, is controlling here.

When the Indians of Nevada were removed to reservations, scattered Indians were left about the State. In 1917 and in 1926, Congress appropriated funds out of which land was bought in trust for these Indians. The Acts closely resembled the Choctaw Act of May 25, 1918, and like that early act did not refer to the Indians, specifically as a tribe. In considering whether this created "Indian country" and federal criminal jurisdiction although Nevada had already become a State, the Supreme Court in *United States v. McGowan,* stated, 302 U.S. at 538-539 (1938):

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony." In the case of United States v. Pelican, 232 U.S. 442, 449, this Court said:
>
> "In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*"

> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. Ramsey*, 271 U.S. 467, 471. [footnotes omitted, emphasis in original.]

While it is clear that the Mississippi Choctaw Reservation is validly established, the existence of federal and tribal criminal jurisdiction, and the absence of state jurisdiction, turns on the definition of Indian country in 18 U.S.C. 1151 not "reservation status." As *McGowan* demonstrates, the acquisition of land in trust for the Indians and the extension of federal services to them creates Indian country. Under 18 U.S.C. 1151, federal jurisdiction extends not only to all land within an Indian Reservation but to "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state . . . ." The land held in trust for the Mississippi Band of Choctaw Indians is clearly within this definition.

C. The jurisdiction of the United States and the Tribe is Exclusive as to Crimes Involving Indians.

The criminal jurisdiction of the Tribe and of the United States precludes state jurisdiction over offenses committed by or against Indians in Indian country, and thus precludes jurisdiction by the State of Mississippi over the appellants here.

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), this Court, after determining that the crime in question occurred in Indian country under 18 U.S.C. 1151 because it occurred within an Indian reservation although on non-Indian land (*id* at 357-359), specifically held (*id* at 359):

> "Since the burglary with which petitioner was charged occurred on property plainly located within the limits of that reservation, the courts of Washington had no jurisdiction to try him for that offense."

See also *United States v. Antelope*, 430 U.S. 641. The Court's holding in *Seymour* is in harmony with the general principal restated in *McClanahan v. Arizona Tax Commission* 411 U.S. 164 (1973) that whether based on tribal sovereignty or federal pre-emption, state law is generally not applicable to Indians within Indian country with tribal governments unless such state law is expressly made applicable by Congress, 411 U.S. 164, 167-174. Indeed, as the Court stated in *McClanahan* (411 U.S. at 171,) quoting from *Williams v. Lee*, 358 U.S. 217):

> ". . . state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive . . . ." (411 U.S. at 171)

The wisdom of these decisions has been amply demonstrated in the Choctaw experience. The exercise of state jurisdiction resulted in a double problem—inadequate law enforcement, and abusive law enforcement. Both of these problems have been substantially resolved by the establishment of the BIA-tribal court, police force and jail,

and federal prosecution of major crimes, whether by or against Indians (see *United States v. Antelope, supra*).[18]

D. The fact that the land is not all contiguous is irrelevant

The court of appeals reasons (Pet. App. 5a-8a) that 18 U.S.C. 1151 is not intended to apply to non-contiguous tracts of land, such as the Choctaw Reservation. This is incorrect.

To begin with, the Section has no such requirement, and to impose one would be pure judicial legislation. But in addition, by including category three—trust allotments outside Indian reservations—as within the definition of Indian country, Congress specifically provided Indian country jurisdiction over non-contiguous tracts. Such allotments are by no means uncommon, see *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 (1975).

In addition, the policy of the Act also dictates that there should be federal jurisdiction over the Mississippi Choctaw trust land. To begin with, although some of the land is non-contiguous, the Reservation essentially consists of trust land in seven traditional rural Indian communities far removed from centers of non-Indian

[18] Neither the State, the United States nor the Tribe seeks concurrent state-federal jurisdiction where Indians are involved. In terms of law enforcement where everyone has responsibility, no one has responsibility. From the Tribe's view, moreover, concurrent jurisdiction, in addition to weakening law enforcement, leaves defendants open to double prosecution, as was the case here. But more important it again would subject tribal Indians to arrest, incarceration, and trial by county authorities for matters involving Indians and occurring on the Reservation, a situation that proved bad for all concerned in the past.

population. Within each village, the Indian land is reasonably compact and is well known and marked. No one as a practical matter is confused about whether he is on Indian land or privately owned land.

But most important, in nine years of tribal and federal law enforcement, any inconvenience in the situation of Indian land has been far outweighed by the benefits of law enforcement responsive to the needs of the quite separate Indian community. The experience of federal-Indian law enforcement has, in the Tribe's view, and we believe in the view of the non-Indian community as well, proved itself a success (see Apps. B, C and D, *infra*). The court of appeals' "practicality" argument is unfounded.

CONCLUSION

The decisions of the Supreme Court of Mississippi and of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded to the court of appeals for consideration of the non-jurisdictional issues.

Respectfully submitted,

HARRY R. SACHSE

SONOSKY, CHAMBERS
& SACHSE
2030 M Street, N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae.

APPENDIX

APPENDIX A

Law and Order

December 17, 1968

Commissioner, Bureau of Indian Affairs
Washington, D.C. 20242
Attention: Chief, Branch of Law and Order

Dear Sir:

In response to a telephone conversation with Mr. James Fail requesting information pertaining to the status of the Roby Gibson Case, the following information is being submitted.

Brief: During the early morning hours of May 26, 1968, Roby Gibson was alleged to have murdered his wife, Helen, by apparently drowning her in a bathtub of their home which was located in the Pearl River Indian Community, Neshoba County, Mississippi. Mr. Gibson was arrested at approximately 10:00 A.M. on May 26, 1968, by E. G. "Hop" Barnett, Sheriff of Neshoba County, Mississippi.

On May 27, 1968, Roby Gibson appeared before Vernon Myers, Justice of the Peace, Philadelphia, Mississippi, on a complaint filed by Sheriff Barnett, charging Roby Gibson with Murder. The defendant was arraigned, held without Bond, and remanded to the custody of the sheriff and lodged in the Neshoba County Jail awaiting trial at the Fall Term of Court.

On September 6, 1968, a complaint was filed by Special Agent Don Ceaser of the FBI before U. S. Commissioner Richard Wilburn of Meridian, Mississippi, charging the defendant in violation of Title 18, Sections 1153 and 111, USCA—Murder. A warrant was issued and subsequently placed against the defendant who was being held in the Neshoba County Jail on a State's charge of Murder.

On September 13, 1968, the Honorable O. H. Barnett, Judge of the Circuit Court of the 8th. District in and for Neshoba County, rendered the following decision to wit: "therefore the jurisdiction of this case is found to be within the exclusive jurisdiction of the United States Federal Courts, and it is hereby

ORDERED, ADJUDGED AND DECREED that said Writ of Habeas Corpus be sustained, and that is has come to the Courts attention that the petitioner has been placed on a detainer by the U. S. Commissioner of the Southern District of Mississippi.

Being informed of said detainer and of the issuance of a warrant for his arrest, the court orders, adjudges and decrees that said Sheriff keep the Petitioner in his custody to await his formal arrest by U. S. Federal Marshalls.

ORDERED AND ADJUDGED, this, the 13th day of September, 1968."

Sgd./O. H. Barnett

On September 16, 1968, U. S. Deputy Marshall E. P. Miller took the defendant into custody and appeared before U. S. Commissioner Richard Wilburn of Meridian, Mississippi, and the defendant was committed to the Lauderdale County Jail in lieu of $1,000 bail.

On September 23, 1968, the defendant reappeared before U. S. Commissioner Richard Wilburn of Meridian, Mississippi. The defendant waived preliminary hearing and was remanded to jail without bond.

On October 30, 1968, on a motion made by the defendant's attorney, a pre-trial hearing was held in the Chambers of the Federal District Judge, Judge Cox, relative to releasing the defendant on his own recognizance. Judge Cox's decision relative to this matter was that he

did not feel that it was appropriate to release the defendant on his own recognizance at this time. Judge Cox set bond at $15,000.

On December 3, 1968, the Grand Jury entered a true bill charging the defendant with Murder pursuant to Sections 1153 and 111, Title 18, USCA.

Sincerely,

(sgd.) E. J. Fisher

E. J. Fisher
Acting Superintendent

cc:
chron
file—L&O 175.6
Adm.
chron

APPENDIX B

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

/s/ Robert C. Benn
Superintendent

VERNON R. COTTEN
ATTORNEY AT LAW
205 MAIN STREET
CARTHAGE, MISSISSIPPI 39051
TELEPHONE
AREA CODE 601
267-9971

February 1, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

RECEIVED
CHOCTAW AGENCY
PHILADELPHIA, MISSISSIPPI
FEB 06 1979
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

RE: In the Matter of the Tribal Court

Dear Robert:

I am writing this letter in my capacity as Leake County Prosecuting Attorney and in support of the efforts which you and your subordinates are now making to restore the Tribal Court system and the Indian Law and Order agency.

I feel that I am qualified to evaluate the effectiveness of the Tribal Court, as I have been Prosecuting Attorney for the past 10 years. There have been a number of occasions during this time wherein we have had to call upon Law and Order to assist us in serving papers or making arrests on the reservation. To the best of my information, that cooperation has been 100 percent.

Our criminal docket is usually heavy, and the machinery of the Tribal Courts has certainly served to take a burden off Leake County. I have had a chance to observe the justice and punishment meted out by the Tribal Criminal authorities, and here again I believe this has been effective.

I also serve as Youth Court Prosecutor in my capacity as County Attorney. When I first took office, we were dealing with Indians through the Leake County Youth Court. However, it later developed that the Tribal Court took jurisdiction. I feel the latter move has been more effective because you actually have dormitories and physical facilities on the reservation to deal with Indians exclusively and they are probably more responsive to rehabilitation efforts from their own people.

In summary, please consider this my letter of support and best wishes in your efforts in trying to restore the Tribal Court system which existed in 1977. I pledge my support

VERNON R. COTTEN
ATTORNEY AT LAW
208 MAIN STREET
CARTHAGE, MISSISSIPPI 39051

TELEPHONE
AREA CODE 601
267-9071

and help in any way needed.

With kindest personal regards, I remain,

Very truly yours,

Vernon R. Cotten

Vernon R. Cotten

VRC:if

cc enclosed for Kaye

APPENDIX C

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

BOARD OF SUPERVISORS
WILLIAM E. WOOTEN
District One
DARRELL F. DICKENS
District Two
BENNIE TRUESDALE
District Three
LEON WATKINS
District Four
CRAWLEY ALFORD
District Five

Leake County Board of Supervisors

CRAWLEY ALFORD, President
Carthage, Mississippi 39051

NEAL [illegible]
Clerk
ROBERT BROOKS
Attorney

February 6, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

Re: In the Matter of the Tribal Court

Dear Sir:

We would like to express our support for your efforts in trying to restore the Tribal Court system which existed in 1977. The Tribal Courts have served to take a great burden off the Criminal and Youth Courts of the county, thereby reducing the economic burden of the County Government.

The Indian Law and Order Agency has been very efficient in maintaining order and the Tribal Courts have been very effective in administering justice.

We believe that it would be in the best interest of all Leake Countians that the Tribal Courts and the Indian Law and Order Agency be restored.

Very truly yours,
D. C. Alford

D. C. Alford, President

RECEIVED
CHOCTAW AGENCY
PHILADELPHIA MISSISSIPPI
FEB 06 1978
AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

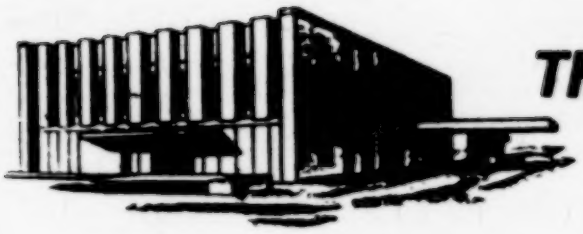
APPENDIX D

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

/s/ Robert C. Benn
Superintendent



THE CITIZENS BANK
OF PHILADELPHIA
PHILADELPHIA, MISSISSIPPI 39350

February 20, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

Dear Sir:

We plan to open our Pearl River Branch no later than April 15th of this year and our security for the Branch Bank is tied in to the law and order building on the reservation. We hope that the tribal law and order system will be reinstated for this and several other reasons. The Agency does a good job in maintaining order and we understand the court system is quite effective.

We think it would be good for all Neshoba Countians for this tribal law and order and court system to be restored.

Sincerely,

Steve Webb
President

SW/bnh

Serving Since 1908